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IN THE

Supreme Court of the United States

October Term, 1970

No. 492

NORMAN C. GALLAGHER and RUTH I. GALLAGHER, husband and wife,
Petitioners,

v.

CHARLES S. WILBOUR and HARRIET G. WILBOUR, his wife; and CHESTER L. GREEN and RUBY GREEN, his wife; on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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No. .....

NORMAN C. GALLAGHER and RUTH I. GALLAGHER, husband and wife,
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CHARLES S. WILBOUR and HARRIET G. WILBOUR, his wife, and CHESTER L. GREEN and RUBY GREEN, his wife, on behalf of themselves and all other residents and property owners of the Town of Chelan, State of Washington, and all other members of the general public similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered in the above entitled action.

OPINION BELOW

The Washington Supreme Court's opinion is reported at 77 W.D.2d 307, 462 P.2d 214 (1969). A copy is attached hereto as Appendix A.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

The Washington Supreme Court's opinion was filed on

December 4, 1969. The court denied a Petition for Rehearing by Order dated May 7, 1970. The judgment sought to be reviewed then became final. A copy of the judgment is attached hereto as Appendix B.

QUESTION PRESENTED

1. Does the judgment of the Washington Supreme Court —which judgment prohibits petitioners from filling or otherwise developing their property (the property being privately owned uplands subject to intermittent submergence due to the artifical raising of the level of Lake Chelan by a dam) so that the public may use petitioners' land, when submerged, for recreational purposes—constitute a taking of property rights without compensation in violation of the Fourteenth Amendment to the Constitution of the United States, when:

(a) it prevents petitioners from making any reasonable use of their property;

(b) its effect, in the courts own words, is to create ". . . a new type of privately owned shorelands of little value . . ."; and

(c) it represents a sudden, unpredictable change in state law, the effect of which is to defeat the constitutional prohibition against taking property without due process of law?

STATUTES INVOLVED

U. S. Constitution, Amendment 14, Section 1; Washington Constitution, Art. I, Sec. 16, Amendment 9. These provisions are set forth in Appendix C hereto.

STATEMENT OF THE CASE

The property involved is located on Lake Chelan in the State of Washington. In its natural state, the property was privately-owned uplands, situated entirely above the high water mark of the lake. The property was platted into lots with streets and alleys. In 1927, Chelan Electric Company, desiring to raise the level of the lake for power generation purposes, acquired numerous parcels of property around the lake including the property herein involved. Chelan Electric Company also secured the vacation of the streets and alleys. The company then rededicated the streets and alleys and resold the lots, reserving to the company the right to raise the level of the lake and to overflow the land to the extent necessitated by raising the lake level. Since 1927, the level of lake has periodically been raised to fluctuating levels which at times overflowed petitioners' land involved in this litigation.

In 1961 and again in 1964, petitioners, pursuant to building permits from the town of Chelan, and not in violation of any applicable zoning provisions of the town, filled the various lots which they owned so that the property would not be overflowed and could be developed and used.[1]

In 1964, after petitioners commenced their last fill operation, respondents (who are adjoining property owners) commenced this lawsuit on behalf of themselves and the general public to enjoin the fills. The trial proceeded upon a theory that respondents had acquired "prescriptive rights" and the trial court's findings of fact, conclusions of law and judgment against petitioners were based upon

1. Petitioners also filled in portions of the dedicated alleys and streets but that portion of the litigation is not involved in this petition.

that theory (Tr. 50-57, 61-65). The lawsuit was appealed to the Washington Supreme Court and presented and argued to that court on the respondents' theory of prescriptive rights (Briefs of appellant and respondents; 77 W.D.2d at 314, 320).

The majority of the Washington Supreme Court refused to consider the question of prescriptive rights (77 W.D.2d at 314). As the dissenting members point out, a determination of the case on that issue would have required a reversal (77 W.D.2d at 320-321).

The majority of the court also refused to consider whether petitioners' land by deed was subject to a flowage right (which would have permitted filling) or a storage easement (which would have prohibited filling without the consent of Chelan Electric Company or its successor). It should be noted that the owner of the right to overflow or store water was not a party to the lawsuit and was not objecting to the fill. Indeed, the only evidence in the record concerning the owner of this right, is that it expressly consented to the filling of petitioner's property (St. 18/1). As the dissenting opinion demonstrates, consideration of this issue would require a reversal and judgment in favor of petitioners (77 W.D.2d at 322).

The majority of the Washington Supreme Court affirmed on a theory of their own creation.[2] The majority opinion proclaims that whenever private property first becomes subject to artificial submergence from a navigable body of water, the public has the right to use the land for recrea-

2. That this was not respondents' theory is dramatically illustrated by the fact that the record shows that the majority's opinion if equally enforced against respondents would require the destruction of fills and improvements on their own property which would substantially impair its value.

tional purposes whenever it is under water and from that time forward, the property owner may not improve the land, fill it or in any way prevent future submergence and public use. These public rights are claimed to be corollary to state navigation rights[3] (77 W.D.2d at 316-317).

The majority opinion itself recognized that it had effectively prohibited any reasonable use of the property by petitioners, had destroyed the property's value to petitioners and was creating a ". . . new type of privately owned shorelands of little value . . ." (77 W.D.2d at 318, footnote 13).

Upon a Petition for Rehearing, petitioners and various *amici curiae* brought to the attention of the Washington Supreme Court that: (1) the majority opinion constituted a taking of property rights without compensation in violation of the Fourteenth Amendment of the U.S. Constitution and the Ninth Amendment of the Washington Constitution; and that (2) the majority opinion was contrary to the established law in the State of Washington concerning natural tidelands and shorelands (Petition for Rehearing, p. 6; Brief of *Amici Curiae* Robert W. Graham and Edward G. Lowry III, pp. 36-41 *Amicus Curiae* Brief of Slade Gorton, Theodore O. Torve and William C. Erxleben, pp. 31-35).

The Petition for Rehearing was denied without comment on May 7, 1970.

ARGUMENT

1. Importance of the Question

The question is, of course, of immense importance to petitioners who now have only this court to look to for the

3. Federal navigation rights are not involved in this decision.

prevention of the loss of their property without compensation.

It is also, however, a question of great importance for the nation as a whole. With increasing population and the concommitant pressures for increased recreational facilities during a time of serious financial pressures upon the states, the states will become increasingly tempted to secure these facilities by taking private property rights without compensation. In other states which have faced this problem it has been the legislatures which have succumbed to the temptation—and the highest courts in those states which have had to strike down or limit legislative acts so as to prevent the taking of property rights without compensation. Unfortunately, in this case it is the Washington Supreme Court which has succumbed to the temptation [although previously cautioned against such action by this court—see *Hughes v. Washington*, 389 U.S. 290, 19 L.ed.2d 530 (1967)]. Obviously if the Washington Supreme Court is successful in its attempt to make private property rights subject to public recreational uses without compensation to the owners, there will be strong pressure on other state courts to do likewise.[4]

4. The record does not actually present the question of whether or not natural tidelands and shorelands sold by the state for valuable consideration would be subject to the same restrictions imposed upon petitioners' land. The Attorney General of the State of Washington, however, has publicly pronounced an intention to press a broad interpretation of the court's decision so as to apply it even to tidelands and shorelands which the state has sold, purportedly in fee simple, for substantial sums of money. All title insurance companies in the state now refuse to insure any such lands without expressly reserving exceptions as to any public rights created by the decision in this case. (Brief of *Amicus Curiae* Edward A. Rauschar, pp. 2-4; Brief of *Amici Curiae* Robert W. Graham and Edward G. Lowry, III, pp. 10-11.)

This decision has thus created chaos with regard to the title to, and development of, all tidelands and shorelands in the state. It may well be, as many now urge, that it was a grievous mistake, as a matter of policy,

2. The Question Presented—a Sudden Change of Law Which Destroys the Use and Value of Private Property Is an Unconstitutional Taking Without Compensation

As recognized in *Shively v. Bowlby*, 152 U.S. 1 at 26, 38 L.ed. 331 at 341 (1894), each state has been free to develop its own policies concerning the use of lands under tidal waters. Prior to the decision of the Washington Supreme Court, the established policy in the State of Washington was for the State to sell portions of its natural tidelands and shorelands for the express purpose of encouraging their development and filling. Thus, historically, private owners of natural tidelands (defined as the land between ordinary high water and mean low tide) and natural shorelands (defined as the land on non-tidal bodies of water between ordinary high water and the line of practical navigation) were free to fill and develop their property. Virtually all of such tidelands and shorelands were acquired from the State for valuable consideration, see Article 15, Wash. Constitution; Revised Code of Washington, Title 79.

In *Globe Mill Co. v. Bellingham Bay Improvement Co.*, 10 Wash. 458, 38 Pac. 1112 (1895), the Washington Supreme Court had recognized this very early in the State's history:

> ". . . The fact is that the legislature, in proposing to dispose of the inner tidelands, under the provisions of the constitution in regard to harbor areas, acted on

for the state to sell its tidelands and shorelands. (See: Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 Wash. L. Rev. 65 (1970); Rauscher, *The Lake Chelan Case—Another View*, 45 Wash. L. Rev. 523 (1970)), but we think it is clear that the attempted subjection of those lands—purchased in fee from the state—to public rights as announced in the decision below would constitute a taking of such property requiring compensations.

the supposition that all these tidelands are in the course of time to be converted into solid lands. It disposes of them as land and as land only; . . ." 10 Wash. at 463.

See also: *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035 (1913) [natural shoreland owner has the right to improve his property to the line of practical navigation]; *Boyer v. State*, 19 Wn.2d 134, 142 P.2d 250 (1943) [lessee of tidelands was entitled to compensation for the State's taking of the improvements (including fill) on the tidelands]; *Wyckoff v. City of Seattle*, 60 Wn.2d 100, 317 P.2d 935 (1962) [recognizing that the legislature in providing for platting of tidelands anticipated that they would be filled].

The Washington Supreme Court had previously recognized the right of the owner of tidelands to exclude the public both from the land [*Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922 (1908)] and from recreational boating, fishing and duck hunting on the water which covered the tidelands at high tide [*Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179 (1909); *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943)].

The State of Washington has, of course, recognized state rights of navigation but these "navigational rights" have always been restricted to natural conditions and to navigation in the commercial sense of the primary and traditional rights to make use of waters as a highway for the practical carriage of commerce *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179 (1909); *Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943); *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955).[5] Compare *Dawson v.*

5. *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955), did permit fishing in the entire stream but this was because the entire stream bed was held to be in state ownership. Compare *Strand v. State*, 16 Wn.2d

McMillan, 34 Wash. 269, 75 Pac. 807 (1904), where only the piles actually driven into a narrow navigation channel, thereby preventing commercial navigation, were ordered removed.

Although petitioners' property is *not* naturally subject to submergence and therefore stands in an even higher position of protection, the Washington Supreme Court has denied petitioners even those rights which have traditionally been granted property in the state subject to natural submergence.

The position of the Washington Supreme Court should also be compared with the contrary result that the court has reached under Art. I, Sec. 16, Amend. 9 of the Washington Constitution where private property rights have been taken by the use of a public right of navigation through admittedly "navigable airspace":

> ". . . when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable . . ." *Ackerman v. Port of Seattle*, 55 Wn.2d 400 at 407, 348 P.2d 664 (1960).
>
> "When the land of an individual is diminished in value for the public benefit, then justice and the constitution, require that the public pay." *Martin v. Port of Seattle*, 64 Wn.2d 309 at 319, 391 P.2d 540 (1964) cert. denied 379 U.S. 989, 13 L.ed.2d 610 (1965).

See also: *United States v. Causby*, 328 U.S. 256, 90 L.ed. 1206 (1946); *Griggs v. Allegheny County*, 369 U.S. 84, 7 L.ed.2d 585 (1962).

That the judgment of a state court may constitute a

107, 132 P.2d 1011 (1943), where the court held private owners could fill tidelands and exclude recreational users where there was no interference with navigation of a commercial nature.

taking of property without due process of law was established long ago in the case of *Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226, 41 L.ed. 979 (1897), where this Court said:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument." 166 U.S. at 241.

This principle was recently reaffirmed in the concurring opinion of Mr. Justice Stewart in the case of *Hughes v. Washington*, 389 U.S. 290, 19 L.ed.2d 530 (1967), where he stated:

> "Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners . . . like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.
>
> ° ° °
>
> ". . . To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. *But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such difference would be appropriate. For a State*

> *cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.* Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." (Emphasis supplied) (389 U.S. at 295, 296-297, 19 L.ed.2d at 534-536.)

The highest courts of other states have been faced with comparable attempts by legislative action to destroy the beneficial use and value of submerged lands in order to secure them for the public's benefit without having to pay compensation. These courts have not hesitated to hold these attempts to be in violation of the Fourteenth Amendment to the U.S. Constitution and their own similar constitutional provisions.

In *State v. Johnson* (Me.), 265 A.2d 711 (1970), the property owner was denied permission to fill his salt marshes under the Maine Wetlands Act. This prevented any reasonable use of the land by the owner and rendered it valueless. The court in holding the denial to be an unconstitutional taking, stated:

> ". . . The benefits from its preservation extend beyond town limits and are state-wide. The costs of its preservation should be publically borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of this state-wide conservation program, granting fully its commendable purpose. . . ." 265 A.2d at 716.

See also, for example: *Commissioner of Natural Resources v. S. Volpe and Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965) [an attempt to prohibit the filling of sub-

merged marsh land was held to be equivalent to a taking without compensation]; *Dooley v. Town Plan & Zoning Commission of the Town of Fairfield*, 151 Conn. 304, 197 A.2d 770 (1964) [an attempt to zone land as a flood plain was held to be an unconstitutional taking]; *MacGibbon v. Board of Appeals of Duxbury* (Mass.), 255 N.E.2d 347 (1970) [an attempt to prohibit the filling of a portion of the shoreland was held to be unconstitutional, as a taking without compensation]; *Morris County Land Improvement Co. v. Parsippany—Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963) [an attempt to prevent the filling of land so as to preserve the land in its natural state for the public was held to be unconstitutional as a taking without compensation].

There has been no showing of any obstruction of any form of commercial navigation, *Yates v. Milwaukee*, 10 Wall. 497, 19 L.ed. 984 (1871). It is established that even the federal government cannot impair property rights beyond that really and substantially necessary to control navigation in its traditional sense. *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 70 L.ed. 339 (1926).

The decision of the Washington Supreme Court is clearly a major change in the law of the State of Washington. By the device of extending so-called "corollary rights" far beyond the accepted limits of the primary right of commercial navigation, the state has sought to subject petitioners' property to affirmative recreational uses of the general public without paying any compensation—although petitioner is thereby deprived of any reasonable use of the land and its value is destroyed.

In addition, and even without considering the dramatic change in the law of the state made by this decision, this court has clearly held that a public body cannot prohibit the development of property without the payment of compensation when the public desires to make affirmative use of the property—even though those uses are incidental to commercial navigation. In *Appleby v. City of New York*, 271 U.S. 364, 70 L.ed. 992 (1926), the city sought to prohibit an owner from filling its tidelands to the federal bulkhead line and building a pier to the federal pierhead line. The city's justification was that it had built a pier on an adjacent dedicated, but submerged, street and desired to use the water over the plaintiff's land to moor ships at its dock. Although the city claimed to be asserting public rights incident to navigation, this court had no difficulty concluding that the city had to pay just compensation in order to deprive the owner of the right to fill and develop his privately owned tidelands.

Furthermore, it must be remembered that petitioner's land is not naturally subject to submergence, but is only periodically subject to artificial submergence. It is well established that public rights of navigation do not extend beyond the ordinary and natural condition of the stream or lake. *United States v. Cress*, 243 U.S. 316, 61 L.ed. 746 (1917). This court has recognized that where rights to overflow at intervals are taken for the raising of a dam, the nature of the rights taken is:

> "... it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam, subject to paying for the harm actually done ..." *Otis Company v. Ludlow Manufacturing Company*, 201 U.S. 140 at 150, 50 L.ed. 696 at 707 (1906).

The fact that the owner in retaining title also retains the right to protect his land from the water is further demonstrated by this court's adoption of the rule that in compensating for the damage done, the measure of damages cannot exceed the cost of protecting the land from the overflow by dikes or other means. *Manigault v. Springs*, 199 U.S. 473, 50 L.ed. 274 (1905). Even where the property (unlike this case) is taken in fee and permanently submerged, its filling is apparently simply a property matter between the owner and the person doing the filling. *United States v. Dickinson*, 331 U.S. 745, 91 L.ed. 1789 (1947).

Nowhere in this record is there any showing that petitioners did not retain the right to fill their land so as to protect it from intervals of artifically caused submergence. The dissenting members of the Washington Supreme Court expressly point out this fact, but the majority opinion chose to ignore the issue and declare a new rule of law.

There can be no question but that the majority recognized they were creating a new rule of law and a new class of property interest in order to secure recreational uses for the public without the necessity of paying just compensation. The majority opinion itself states:

> ". . . there exists a new type of privately owned shorelands of little value except as a place to pitch a tent when the lands are not submerged." 77 Wn. Dec.2d 307 at 318, footnote 13.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 39444 En Banc December 4, 1969

CHARLES S. WILBOUR *et al., Respondents and Cross-appellants v.* NORMAN G. GALLAGHER *et al., Appellants.*

HILL J.—We are here concerned with the uses to which privately owned land can be put, which for "thirty-five years"[1] has been submerged each year by waters of a navigable lake. The submergence at its maximum depth (3 to 15 feet)[2] was for approximately 3 months, June 15 to September 15 each year.

The circumstances and history which furnished the background for the presentation of this unusual problem must be explained in some detail.

Lake Chelan is a glacial gorge in Chelan County, approximately 55 miles in length, and with a width, generally speaking, of from 1 to 2 miles. Its navigability is conceded.[3] Prior to 1927, it lay in its natural state with the level of its waters at 1,079 feet above sea level. By 1891 the land involved in this action had passed into private ownership being included in the "Plat of the Town of Lake Park."[4] The platter dedicated and quitclaimed all streets and alleys therein to the use of the public forever. All of

1. "Thirty-five years" is based on the stipulation of the parties and the findings of the trial court. There is evidence that the land has been submerged each year since 1927.

2. This was at the same time; 3 feet being on the landward side of the property, and the 15 feet on the lakeward side.

3. Lake Chelan is navigable by any test and there is no necessity to resort to the "contemporary test" referred to by Professor Charles E. Corker, *i.e.*, can it "float a Supreme Court opinion." 45 Cal. L. Rev. 604, 617 (1957).

4. The plat was recorded June 19, 1891 in the office of the auditor of Okanogan County. The property is now in Chelan County which was formerly a part of Okanogan County.

the platted property subsequently became a part of the town of Lakeside, and is now a part of the town of Chelan. The date of incorporation of Lakeside does not appear from the record, but on May 2, 1927, by ordinance No. 24, the town vacated certain specifically described streets and alleys.[5] On the same day, the Chelan Electric Company and the Lake Chelan Box Factory, both Washington corporations, as parties of the first part (and apparently the owners of all of the property contiguous to the vacated streets and alleys and who acquired title thereto by virtue of the vacation) executed an instrument (duly recorded) which contained the following recitals and grant:

> THAT WHEREAS, the Town of Lakeside did by Ordinance passed May 2nd, 1927, and numbered 24, vacate those portions of the streets and alleys hereinafter named, in the Town of Lakeside; and,
>
> WHEREAS, the Chelan Electric Company as a part of its power project, intends to impound the waters of Lake Chelan, and to raise the same to the elevation of 1100 feet, still water measurement, above mean sea level, and to inundate and overflow to said elevation, those portions of the streets and alleys described in said ordinance; and
>
> WHEREAS, the Town of Lakeside, party of the second part, desires, for itself and the public, to have the right of access over the lands and premises included within the boundaries of the portions of said streets and alleys described in said Ordinance, to Lake Chelan, at all stages of water, but not, however, to interfere with the impounding or storage of said waters as stated above, or the flow thereof.
>
> NOW, THEREFORE, the parties of the first part, in consideration of One Dollar ($1.00) and other valuable consideration to them in hand paid by the party of the

5. All of the streets and alleys with which we are here concerned were included in this vacation, and were also included in the grant of access referred to in the next paragraph.

second part, receipt of which is hereby acknowledged, do *convey and quit claim unto the part of the part of the second part, in perpetuity, the right of access, for itself and the public, over the lands included within the boundaries of those portions of the vacated streets and alleys hereinafter described, to Lake Chelan, at all stages of water*, not however, interfering with the right of the first party, Chelan Electric Company, its successors and assigns to impound the waters of Lake Chelan and *to raise the same to the elevation of 1100 feet, still water measurement above mean sea level, and to inundate and overflow to the said elevation, those portions of the vacated streets and alleys hereinafter described*, or the impounding or storage of the waters of Lake Chelan as stated above, or the flow thereof; those portions of the said vacated streets and alleys, being more particularly described as follows, to-wit:

(Italics ours.) Then followed a listing of exactly the same streets and alleys which had been included in the vacation ordinance.

It should be noted that the public is the beneficiary of the grant in perpetuity of ". . . the right of access . . . over the lands included within the boundaries of those portions of the vacated streets and alleys hereinafter described, to Lake Chelan, at all stages of water . . ."

The Chelan Electric Company[6] constructed a dam, pursuant to a permit by the Federal Power Commission, which permitted the annual raising of the level of the lake to 1,100 feet above sea level, with the requirement that it reach that level by June 15 each year. Thereafter in May of each year the dam was closed and the waters gradually rose to the 1,100 foot level, presumably by June 15th. They were maintained at that level until September when the

6. The Chelan County Public Utility District No. 1 has succeeded to all the rights and interests of the Chelan Electric Company in the dam, and the rights granted by the Federal Power Commission.

dam was opened and the waters gradually subsided to the natural 1,079 foot level.[7]

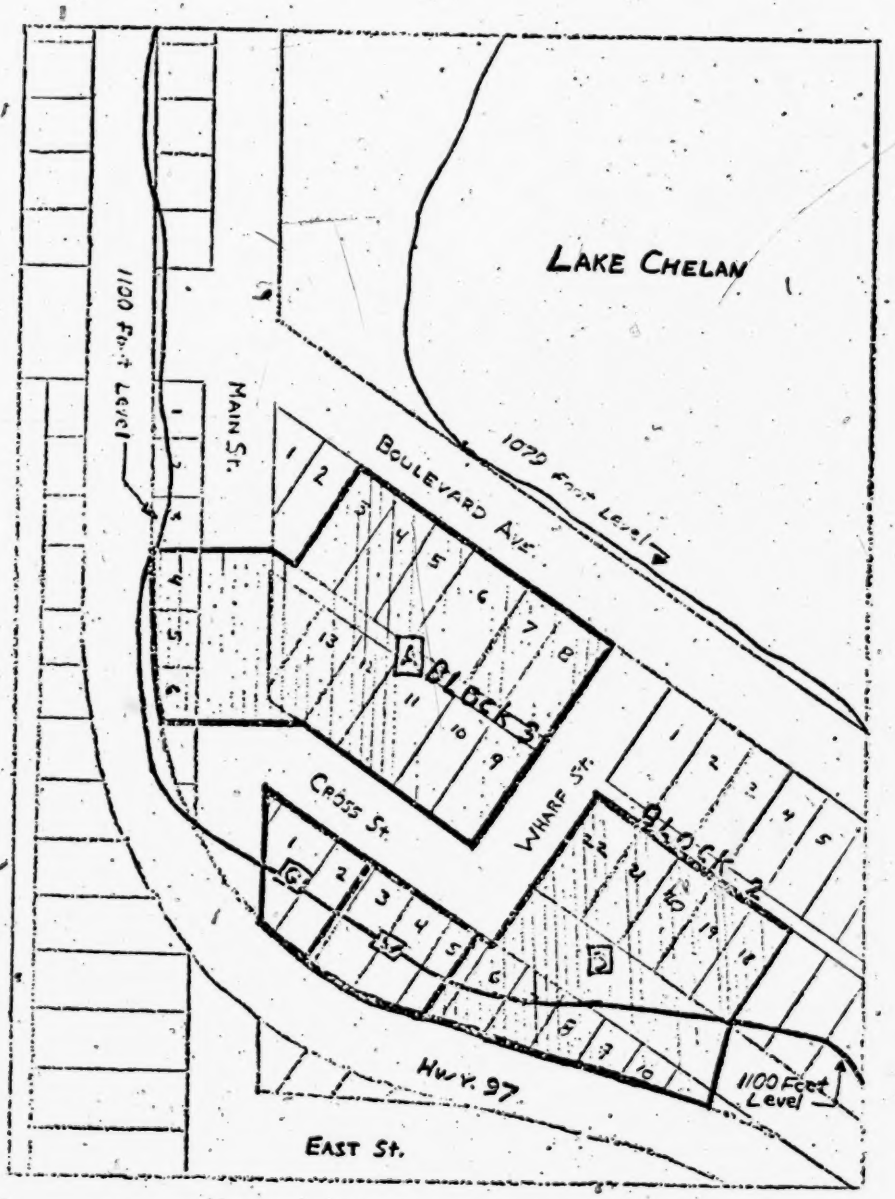
We come now to a consideration of the right claimed by the defendants, Norman G. Gallagher and Ruth I. Gallagher, his wife, to fill their land below the 1,100 foot level to a height 5 feet above that level, and thus prevent its being submerged and making it available for use at all times. (Certain fills have now been completed.)

The claimed right is challenged by the plaintiffs (Charles S. Wilbour and Harriet C. Wilbour, his wife; and Chester L. Green and Ruby Green, his wife) who brought a class action on behalf of themselves and the public asking that the fills be removed, and asking for damages to their own properties caused by the fills.

To assist in an understanding of the situation, we have prepared a drawing, which appears on the opposite page. It is not drawn to scale, neither is it an exhibit in the case and it has been prepared for illustrative purposes only. It is based primarily on Exhibit 5, a large drawing by Mr. Gallagher showing the fills he has made. It shows also the approximate water line of Lake Chelan at both the 1,079 and 1,100 foot levels. The lots, blocks, streets and alleys are as shown in the plat of Lake Park, and State Highway 97 has been superimposed. Unfortunately, the block numbers, other than 2 and 3, were omitted, and they will be supplied in our narrative explanation of the drawing.

The shaded area has been divided into 4 letterred seg-

7. There was testimony which indicated that the water never had reached the 1,100 foot level, but that some years it was higher than others. There was evidence, too, that some years the water did not recede all the way to the 1,079 foot level. These variations are not material in our discussion, and we will assume that the water line at these levels represents the high and the low water marks of the lake.



A - GALLAGHER FILL, BLOCKS 3 and 6, MAIN and CROSS STREETS
B - GALLAGHER FILL, BLOCKS 2 and 4, CROSS STREET
G - GREEN PROPERTY
W - WILBOUR PROPERTY

ments G and W are the properties owned by the plaintiffs (the Greens and the Wilbours), improved with their respective homes, and lying partially above and below the

1,100 foot level[8] (all of block 4, plat of Lake Park). A and B represent the two fills made by the defendants (the Gallaghers), both fills have access to Highway 97, and are now being used as trailer courts.[9] A includes block 3, plat of Lake Park (except lots 1 and 2), including the alley in that block extending from vacated Wharf Street to vacated Main Street; a portion of block 6, plat of Lake Park, between the highway and vacated Main Street; also portions of vacated Main and Cross[10] Streets. B includes a part of block 4, plat of Lake Park between the highway and vacated Cross Street; lots 18 to 22 inclusive, block 2, plat of Lake Park; and the portion of vacated Cross Street lying between the indicated portions of blocks 4 and 2. A portion of the intersection of vacated Cross and Wharf Streets also has been blockaded by a construction of the defendants, not shown on the drawing.

The trial court found that for 35 years prior to the trial (July and September 1965) and except for the filling by the defendants, commenced in 1961, the waters of Lake Chelan

> covered the lands of Defendants in Blocks 2 and 3, Lake Park, including the streets and alleys in and adjacent to said Blocks 2 and 3, for a period each year from late

8. The drawing would indicate that a half or more of the Green and Wilbour properties were below the 1,100 foot line; the evidence is that at its highest the water level impinges but slightly beyond Cross Street. The situation referred to in note 5 may afford a partial explanation of the difference between the actual high water line and the 1,100 foot level as shown on the drawing.

9. B was in use as a trailer court at the time of the trial; and we gather from statements made in argument, that A is now in use for the same purpose.

10. The portion of vacated Cross Street included in A is quite small and is right at the intersection of vacated Main with Cross Streets. The unfilled portion of Cross Street, now a shallow moat at high water, affords the Greens their only access by water to the lake.

spring through September, to a depth of three feet to fifteen feet.

And that for the same period

> the general public, including Plaintiffs and their respective predecessors in interest, have used the waters covering the portions of Blocks 2 and 3, Plat of Lake Park, now owned by the Defendants, as well as the water covering portions of the streets and alleys adjacent thereto, for fishing, boating, swimming and for general recreational use and that said use was open adverse, notorious and uninterrupted for said period, during the period of each year when water covers the said portions of Blocks 2 and 3 and the adjacent streets and alleys.

The trial court ultimately concluded (based upon estoppel) that the defendants should not be compelled to remove their fills, but awarded the plaintiffs damages, finding that the value of the Wilbour property had been lessened $8,500, and the value of the Green property had been lessened $11,000 by reason of the fills established by the defendants.

The trial court provided in its judgment:

> That in the event the remedy of abatement shoud be determined to apply upon any appeal in this cause, then each Plaintiff should have and recover judgment against Defendants in the sum of $1,800.00 per year from July 1, 1964 to the date of completion of abatement of said fill in its entirety.

This lessening of value was predicated principally on the loss of view, but also on inability to use the water over the filled land for navigation, fishing, swimming, boating and general recreational uses; and because, in consequence of the defendants' fill, "algae has become an increasing problem, which has created an unsightly situation on Plaintiffs' beaches."

From this judgment the defendants appealed, urging that they were simply making their own property usable and that any damages sustained by the plaintiffs were damnum absque injuria.

The plaintiffs have cross-appealed urging that the defendants' fills should have been abated.

The importance of this litigation transcends the consideration it has received from the public authorities. If every owner of property between the 1,079 foot and the 1,100 foot level around Lake Chelan has the right the defendants claim, the public's right in the navigable waters of that lake above the 1,079 foot level would be practically nil.

The property owners could make any use, not prohibited by law, of their properties—from fills for trailer parks close to the highways to high-rise apartments close to the lake.

Unless the laws applicable to the use of navigable waters apply to this annual artificial extension of the water of Lake Chelan, to preserve the status quo, it would seem that everybody is on his own.

The plaintiffs have made an excellent case on the basis of prescriptive rights. The filling of the vacated streets and alleys by the defendants cannot be sustained on any basis; since they had acquired no title to them and, in any event, the public had the right of access over the lands included within the boundaries of the vacated streets and alleys to Lake Chelan at all stages of water. Further, the obvious purpose of the contemporaneous vacation and the grant to the public of the right of access was to enable the Chelan Electric Company to acquire the right to submerge the

streets and alleys and yet to preserve to the public the right of access over them to the lake "at all stages of water."

However, it is unnecessary to rely on prescriptive rights, or on the rights of the public to use the land within the vacated streets and alleys for access to the lake. We prefer to rest our decision on the proposition that the fills made by the defendants constitute an obstruction to navigation.

While this is a matter of first impression and no exactly comparable case has been found, our holding represents the logical extension of established law in somewhat comparable situations.

There was no private ownership of the land under Lake Chelan in its natural state, and no right to obstruct navigation.

It is well settled that if the level of the lake had been raised to the 1,100 foot level and had been maintained constantly at that level for the prescriptive period, the 1,100 foot level would be considered the natural level of the lake with the submerged lands being converted into part of the lake bed and to state ownership. The public would have the right to use all of the water of the lake up to the 1,100 foot level. *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944); *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436 (1899).

We have here, however, not only the raising of the lake level by artificial means, but the distinctive features that the level does not remain constant and that the owners of

the land between the 1,079 and the 1,100 foot level can occupy their property during most of the year.[11]

We find a somewhat comparable situation in those navigable lakes which have a natural or seasonal fluctuation in extent, and have a recognized high water line and low water line. However, in those cases the problems involved usually hinge on the rights accorded riparian owners (whose titles go to the low water mark) in the areas between the high and low water marks.

The law is quite clear that where the level of a navigable body of water fluctuates due to natural causes so that a riparian owner's property is submerged part of the year, the public has the right to use all the waters of the navigable lake or stream whether it be at the high water line, the low water line, or in between. *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 1915C Ann. Cas. 1148 (1914). In such situations the riparian owners whose lands are periodically submerged are said to have the right to prevent any trespass on their land between the high and the low marks when not submerged. However, title between those lines is qualified by the public right of navigation and the state may prevent any use of it that

11. Title to the defendants' property below the 1,100 foot level is deraigned through deeds which make it subject "to the perpetual right to raise the waters of Lake Chelan, Washington, to the elevation of eleven hundred (1100) feet above mean sea level, and to perpetually inundate and overflow [said property] to said elevation of eleven hundred (1100) feet above mean sea level." We do not inquire as to who can now enforce this right; or whether property owners whose title is subject to similar flowage and inundation rights have any cause for complaint, if other property owners fill their land so that it cannot be overflowed. We merely call attention to this reserved right to indicate that the defendants must have purchased their property with full knowledge of it, and that there can be no limitations as to when the right may be exercised.

interferes with that right. *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923). *See* Annot., *Right of public to use shore of inland navigable lakes between high and low water mark*, following *Stewart v. Turney, supra*, and *Doemel v. Jantz, supra*, at 31 A.L.R. 960, 978 (1923). When the land is submerged, the owner has only a qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights, primary and corollary. *Doemel v. Jantz, supra; Diana Shooting Club v. Husting, supra.*

Thus, in the situation of a naturally varying water level, the respective rights of the public and of the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increase since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights. As the level and the area of the water decreases, the rights of the public decrease and the rights of the landowners increase as the waters drain off their land, again giving them the right to exclusive possession until their lands are again submerged. *See, Doemel v. Jantz, supra; Diana Shooting Club v. Husting, supra.*

[1] When the circumstance of an artificial raising of navigable waters to a temporary higher level is synthesized with the law dealing with navigable waters having a naturally fluctuating level, the logically resulting rule for the protection of the public interest is that, where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuation should be consid-

ered the same as a natural fluctuation with the right of the public being the same in both situations, *i.e.*, the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands.

As Chief Justice Cassoday of the Wisconsin Supreme Court suggested in *Mendota Club v. Anderson*, 101 Wis. 479, 78 N.W. 185 (1899) at 493:

> Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam.

Following the reasoning of these cases we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendants' land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342 (1942).[12] When the level of the lake is lowered so that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.

It follows that the defendants' fills, insofar as they ob-

12. This case points out that navigable waters may be divided by proper authority into areas for the exclusive use of one or more of these activities. We have made no attempt to elaborate on the uses corollary or incidental to the right of navigation. An early, somewhat alliterative statement included the right to "boat, bathe, fish, fowl, skate and cut ice" on the "great ponds of New Hampshire." *Whitcher v. State*, 87 N.H. 405, 181 A. 549 (1935). They have now been expanded to include water skiing and skin diving. See *Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342 (1942).

struct the submergence of the land by navigable waters at or below the 1,100 foot level, must be removed.[13] The court cannot authorize or approve an obstruction to navigation.

We come now to a consideration of the damages awarded by the trial court in the event of an abatement.

We do not affirm as to damages because the award of $1,800 a year for each year from 1964 until the fills are abated seems excessive,[14] and because it was apparently predicated to a considerable extent on the loss of a prescriptive right of view.

13. We come to this conclusion with some reluctance since there have been other fills in the neighborhood about which there has apparently been no protest.

It is apparent, however, that if the defendants were to prevail in this litigation the whole area around Lake Chelan between the 1,079 and 1,100 feet levels could be dotted with structures on fills, or stilt-like structures raised above the 1,100 foot level, and buildings resting on columns are now not unusual.

We are concerned at the absence of any representation in this action by the Town or County of Chelan, or of the State of Washington, all of whom would seem to have some interest and concern in what, if any, and where, if at all, fills and structures are to be permitted (and under what conditions) between the upper and lower levels of Lake Chelan. There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate. This presents a problem for the interested public authorities and perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities. Otherwise there exists a new type of privately owned shorelands of little value except as a place to pitch a tent when the lands are not submerged.

14. The trial court apparently did not realize how slowly the appellate process moves. It would (at best) be 1970 before the fills could be removed. Six times $1,800 would be $10,800 for both the Greens and the Wilbours. They would have their properties with the obstructions removed, and damages equivalent to the amount awarded for the depreciation of the value of their property if the fills had not been abated—slightly more for the Wilbours, slightly less for the Greens.

Had the lake never been raised, the defendants, in the

absence of zoning or building restrictions, might have built a high-rise apartment on block 3 and another on block 2, cutting off the view from the plaintiffs' properties. Even with the annual fluctuation, if it were practicable to do so and assuming that no zoning or building restrictions were violated, the defendants might erect temporary structures on their property each September and remove them each May, effectively cutting off the view of the plaintiffs during that period.

[2] The plaintiffs have unquestionably sustained special damages as a result of defendants' wrongful activities, and of a character that sustains their right to maintain this action, *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955); *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904); *Carl v. West Aberdeen Land & Improvement Co.*, 13 Wash. 616, 43 P. 890 (1896). However, we do not agree that there ever was a year-round right of view with which there could be no interference.

We set aside the judgment for damages, and remand with instructions to abate the fills made by the defendants insofar as they interfere with the rights of navigation, primary and corollary, when the water of Lake Chelan stands at any level up to the 1,100 foot level, and with instructions to reappraise such special damages as the plaintiffs may have sustained as a result of the defendants' wrongful interference with their rights of navigation, primary and corollary, and the effects of such wrongful interference upon their property.

FINLEY, ROSELLINI, HAMILTON, HALE and MCGOVERN, JJ., concur.

NEILL, J. (dissenting in part)—Defendants are owners of

platted lots which originally abutted on Lake Chelan, a navigable waterway. In 1927, Chelan Electric Company obtained a permit to raise the water of the lake to a level 21 feet above its natural level. This permit was in connection with the construction of a dam for electrical power generation. The power company owned the subject lots at the time this permit was obtained. Subsequently, it conveyed them subject to its permit rights to seasonally flood the premises.[15]

Accordingly, we are considering the right of defendants as littoral owners to raise the level of the land to create upland out of that which is, by reason of the flowage easement, seasonally foreshore land. We are not here considering foreshore lands of the natural lake. The distinction is determinative.

Against this asserted right of the defendants is the claim of plaintiffs that, as members of the public, they have the right of navigation, swimming, boating and recreation on the waters of navigable Lake Chelan, including the waters which seasonally submerged defendants' property. Plaintiffs further claim a right of view over defendants' lands. Plaintiffs are not littoral owners as to the natural lake.

The trial court based its judgment for plaintiffs on prescription. The court found that the public had seasonally used the waters overlying defendants' lots for fishing, boating, swimming and general recreational use for some 35

15. The record does not disclose whether this was a flowage easement or whether it was more extensive and included the right to seasonally maintain a reservoir on the subject lands. Cf. *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71 (1882), with *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 136 N.E. 224, 24 A.L.R. 1267 (1922). However, this distinction is important only to the Chelan County PUD, as successor in interest of Chelan Power Company, which is not a party to these proceedings.

years, and that such use was open, adverse, notorious and uninterrupted for that period. Defendants do not challenge the finding as to the time period. Accordingly, I will assume that the use by the public was uninterrupted and continuous, though seasonal. However, defendants do challenge the finding that the use by the public was adverse.

To properly focus on the issue before us, it should be pointed out that we are not concerned with the public or plaintiffs' use of the waters of Lake Chelan which seasonally overflow defendants' premises. During such period of flooding, the surface of the lake is thereby expanded and the public may well have the right to use the waters for all navigational uses. That is not the issue before us. Rather, the issue is whether the use of these expanded waters, while in existence, confers on the public the right to have such inundation of defendants' lands continued. It is in this connection that we must review the record for substantial evidence to support the trial court's finding that the use was adverse. Was the use such as to put defendants on notice that a hostile claim was being exercised so that inaction on defendants' part would deprive them of the property? I think not. There would be no reason to object to the boating, fishing and swimming in these waters as defendants did not claim a right to the waters. They claim only the seasonally submerged land. The use of the lake surface was not, in itself, harmful to defendants' property rights. A protest would have been most unnatural as well as unneighborly.

We have long recognized a different rule for adverse possession of open, vacant and unoccupied lands from that applying to enclosures. *Watson v. County Comm'rs of*

Adams County, 38 Wash. 662, 80 P.201 (1905). In *Watson* we quoted with approval from *O'Connell v. Chicago Terminal Transfer R.R.*, 184 Ill. 308, 56 N.E. 355 (1900):

> where land is vacant and unoccupied and remains free to public use and travel until circumstances induce the owners to enclose it, the mere travel across it, without objection from the owners, does not enable the public to acquire a public road . . . [it] is regarded merely as a permissive use.

We then observed

> [I]n order to give a prescriptive right, the use must at least be such as to convey to the absent owners reasonable notice that a claim is made in hostility to his title. It seems to use that any other rule amounts to a practical confiscation of private property for public purposes.

This rule is with sound reason because to take property by user there must be the element of notice to the owner of the allegedly servient estate that the user is laying a claim by the use. To break an enclosure, use an occupied area, or use property in any manner which gives a reasonable person notice of a claim against his property will give rise to an inference that the use is adverse. *Cuillier v. Coffin*, 57 Wn.2d 624, 358 P.2d 958 (1961).

Conversely, use of property which is open, vacant and unimporved creates no such notice. A reasonable person could not be expected to assume hostility solely from a use which is not interfering with his own use of his own land. It seems only reasonable that the rule applicable to open, vacant and unoccupied lands should apply to the instant case. If so applying the rule, I find no evidence at all to support a finding of hostile and adverse use.

I have reviewed the trial court's oral decision to determine the basis for his finding that plaintiffs' use was ad-

verse. There is no discussion of the point. He discussed only the time and continuity elements. Thus, in my opinion, the finding of a prescriptive right must fall.

The majority opinion reaches the conclusion that the fill on defendants' lots is to be removed on the basis that this fill constitutes an obstruction to navigation. Analogizing from the rule that the public has the right to the use of navigable water at both high levels and low levels, subject to the right of littoral owners to reasonably obstruct them with "aids to navigation" such as docks, wharfs, etc. (*see* 31 A.L.R. 976 (1924)), the majority holds that fluctuations of water levels which are artificially created are no different then fluctuations created by nature.

The difficulty, as I view it, is that under the majority's holding there is at taking of defendants' property right for public use without just compensation. Defendants (through their antecedents in the chain of title) have a full fee title diminished *only* by the right of the power company to periodically inundate their lands to a specific elevation. I see no reason in law or equity for preventing such an owner from protecting his land against such inundation by raising the grade of the land.

The periodic flooding involved here is entirely different from a natural raising and lowering of the lake level by reason of rains, seasonal runoff, and drought. In the latter instance, the littoral owner's rights to the foreshore lands between high and low water, whatever these rights may be, are subject to the public's navigation rights. Here, the defendants' lots, *all of which lie above natural high water*, are not subject to public navigation rights unless there has been a voluntary conveyance, eminent domain proceed-

ings, estoppel, or loss through prescription. Unless precluded by one of the aforementioned reasons, defendants have the right to use their lots, including the right to change the grade thereof, in order to make any lawful use thereof. Accordingly, I do not agree that the fill on defendants' lots is unlawful. They should not be required to remove it.

I am in accord with the majority's conclusion as to the vacated streets. Defendants' claim of ownership of the vacated streets, whatever it may be, is limited by the terms of the 1927 conveyance from Chelan Electric Company to the public. Accordingly, defendants do not have a right to raise the level of the street area and thereby deprive the public of the access and use of the water over the vacated streets. Any fill on these vacated streets should be abated. I also agree that the damages recoverable are limited to interference with rights of navigation.

I would remand with instructions to limit an abatement order to the area of the vacated streets and limit plaintiffs' proof of damages to their loss of navigation rights, primary and secondary, caused by the fill on the former street area.

HUNTER, C. J., and DONWORTH, J. PRO TEM, concur with NEILL, J.

APPENDIX B

In the Supreme Court of the State of Washington

No. 39444 Remittitur Chelan County No. 22335

CHARLES S. WILBOUR *et al., Respondents and Cross-appellants v.* NORMAN G. GALLAGHER *et al, Appellants.*

The State of Washington to:

The Superior Court of the State of Washington
in and for Chelan County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on December 4, 1969, became the final judgment of the court in the above entitled case on May 7, 1970. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

Three hundred ninety six and 88/100 dollars ($396.88) in favor of respondents/cross-appellants and against appellants and against appellants' surety, the Fidelity and Deposit Company of Maryland, not to exceed the amount of the surety's bond.

The petition for rehearing was denied by order dated May 7, 1970.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 8th day of May, A.D. 1970.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

APPENDIX C

United States Constitution, Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution, Art. I, Sec. 16, Amendment 9:

AMENDMENT 9

Art I § 16. *Eminent Domain.* Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a

judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.